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No. 82-1565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BACCHUS IMPORTS, LTD.,
and EAGLE DISTRIBUTORS, INC.,

Appellants,

v.

GEORGE FREITAS, Director of Taxation of the State of
Hawaii,

Appellee.

On Appeal From The Supreme Court Of The State Of Hawaii

**BRIEF AMICUS CURIAE OF
DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.
IN SUPPORT OF REVERSAL**

RUSSELL W. SHANNON
LAWRENCE B. GOTLIEB
1300 Pennsylvania Building
425 13th Street, N.W.
Washington, D.C. 20004
(202) 628-3544

RICHARD STAIR HARRELL
Counsel of Record
Suite 560
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 347-5551

*Attorneys for Amicus Curiae
Distilled Spirits Council of the United States, Inc.*

QUESTIONS PRESENTED

Do HAWAII REV. STAT. § 244-4 (6) and (7) (Supp. 1982), which impose a tax on all beverage alcohol sold in Hawaii except okolehao manufactured in the State and fruit wine manufactured in the State from products grown in the State, violate the United States Constitution in that they

- (1) are a duty or impost on imports prohibited by the Import-Export Clause, art. I, § 10, cl. 2;
- (2) are a burden on interstate commerce in violation of the Commerce Clause, art. I, § 8, cl. 3; and
- (3) deny equal protection of the laws in violation of the Equal Protection Clause, amend. XIV, § 1?

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**BRIEF AMICUS CURIAE OF
DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.**

This brief is filed with the written consent of all parties pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States. *Amicus curiae*, the Distilled Spirits Council of the United States, Inc. ("DISCUS"), supports the position of appellants who urge the Court to reverse the decision of the Supreme Court of Hawaii upholding the Hawaii liquor tax, HAWAII REV. STAT. § 244-4 (Supp. 1982).

THE INTEREST OF DISCUS

Discriminatory State Beverage Alcohol Taxes Affect Members Of DISCUS

DISCUS is the principal national trade association of the distilled beverage alcohol industry. The members of DISCUS produce or import approximately 90% of the distilled beverage alcohol sold in the United States.

DISCUS estimates that its members supply approximately 70% of the distilled beverage alcohol sold in Hawaii. DISCUS has an interest in this appeal because those member and their products are discriminated against by HAWAII REV. STAT. § 244-4 (6) and (7) (Supp. 1982), which exempt Hawaiian okolehao and fruit wine from the tax imposed on all other beverage alcohol sold in the State.¹ However, the interest of DISCUS is not limited to those particular tax exemptions.

DISCUS is concerned also about the impact of this appeal on other discriminatory state beverage alcohol taxes. Hawaii has a discriminatory exemption for rum manufactured in the State, HAWAII REV. STAT. § 244-4(8) (Supp. 1982), that did not become effective until after the period covered by this appeal. And Hawaii is only one of many states imposing this type of discriminatory tax.

Thirty-one States Impose Some Type Of Discriminatory Beverage Alcohol Tax

Taxes that either discriminate against beverage alcohol not produced in the state or retaliate against such tax discrimination by other states are in effect in 31 states. Those tax statutes are collected in an appendix of statutes filed with this brief.

¹ The Hawaii liquor tax is imposed on all "liquor" sold in Hawaii except the tax-exempt products. HAWAII REV. STAT. § 281-1 (1976) defines "liquor" to include all beverage alcohol.

Nineteen states including Hawaii impose taxes that discriminate in favor of some or all wine produced in the state from products grown in the state.² One of those states also has a tax favoring table wine manufactured or bottled in the state regardless of where the ingredients are grown.³ One other state treats a domestic winery as a wholesaler, thus exempting it from that state's tax on sales to wholesalers,⁴ while another favors wine made from products grown in the state by imposing a higher mandatory retail mark-up on all other wine.⁵

All beer manufactured in the state is favored by one state tax⁶ and another discriminates in favor of all "low-point" beer manufactured in the state.⁷ Six states offer tax rebates on varying amounts of beer produced in the

² ALA. CODE § 28-6-4 (b) (Supp. 1982); ARK. STAT. ANN. § 48-608 (1977); FLA. STAT. ANN. § 564.06 (2)-(5) (West Supp. 1983), as amended by Fla. Act of July 19, 1983, ch. 349, Section 14, Laws 1983, Senate Bill No. 3-XXX; GA. CODE ANN. § 3-6-50 (1), (3) (Supp. 1983); HAWAII REV. STAT. § 244-4 (7) (Supp. 1982); IND. CODE ANN. § 7.1-4-4-1 (Burns Supp. 1982); LIQ. CONT. L. SERV. (CCH) Kansas § 41-501 (b)(1), (g); ME. REV. STAT. ANN. tit. 28, § 501.4 (Supp. 1982-1983); MD. ANN. CODE art. 4, § 133 (g) (Supp. 1982); MICH. STAT. ANN. § 18.987(1) (Callaghan Supp. 1983-1984); MINN. STAT. ANN. § 340.436 (West Supp. 1983); MISS. CODE ANN. § 27-71-7 (1) (Supp. 1982); N.J. STAT. ANN. § 54:43-1.e (West Supp. 1983-1984); N.M. STAT. ANN. § 60-6A-11 (1981); N.C. GEN. STAT. § 105-113.86 (o) (Supp. 1981), N.C. GEN. STAT. § 105-113.95 (1979); R.I. GEN. LAWS § 3-10-1 (Supp. 1982); S.C. CODE ANN. § 12-21-1040 (Law. Co-op. Supp. 1982); TENN. CODE ANN. § 57-3-207 (e) (1980); VA. CODE § 4-25.1.D (1983).

³ ME. REV. STAT. ANN. tit. 28, § 452 (Supp. 1982-1983).

⁴ WASH. REV. CODE ANN. § 66.24.170 (3) (Supp. 1983-1984), LIQ. CONT. L. SERV. (CCH) Washington § 66.24.210.

⁵ N.H. REV. STAT. ANN. § 178-A:4 (Supp. 1981). New Hampshire is not counted among the 31 states with discriminatory taxes.

⁶ ME. REV. STAT. ANN. tit. 28, § 452 (Supp. 1982-1983).

⁷ S.D. CODIFIED LAWS ANN. § 35-5-3.1 (1977).

state⁸ and two states offer tax rebates equivalent to specified annual expenditures in the state by brewers for plant and equipment.⁹

Hawaii's liquor tax discriminates in favor of okolehao (a brandy distilled from the root of the ti plant) and rum manufactured in the state.¹⁰ Other states impose taxes favoring various types of beverage alcohol other than beer and wine manufactured from products of the taxing state.¹¹ One state discriminates in favor of beverages containing 14% or more alcohol manufactured in the state from products grown in the state, but only if the distiller and bottler operate in that state exclusively and have no affiliation with any out-of-state distiller or bottler.¹²

A number of states impose discriminatory taxes in retaliation for similar taxes imposed by other states. Three states impose this type of retaliatory tax on all beverage alcohol,¹³ two states impose retaliatory taxes on

⁸ ILL. ANN. STAT. ch. 43, § 158 (Smith-Hurd Supp. 1983-1984); IOWA CODE ANN. § 123.146.2 (West Supp. 1983-1984); KY. REV. STAT. ANN. § 243.720 (3) (Michie Supp. 1982); MINN. STAT. ANN. § 340.47. Subd. 2 (West Supp. 1983); R.I. GEN. LAWS § 3-10-1 (Supp. 1982); TEX. ALCO. BEV. CODE ANN. § 203.08 (Vernon 1978).

⁹ OR. REV. STAT. § 473.030 (6) (1981); PA. STAT. ANN. tit. 47, § 112.1 (Purdon Supp. 1983-1984).

¹⁰ HAWAII REV. STAT. § 244-4 (6), (8) (Supp. 1982).

¹¹ ARK. STAT. ANN. § 48-711 (1977); GA. CODE ANN. § 3-4-60 (1982); ME. REV. STAT. ANN. tit. 28, § 501.1 (1964); Wisc. Act of July 1, 1983, Act 27, 1983 New Laws Page 45, SECTION 1494m, § 139.03(2t).

¹² FLA. STAT. ANN. § 565.12 (1)(b), Fla. Act of July 19, 1983, ch. 349, Section 15, Laws 1983, Senate Bill No. 3-XXX, FLA. STAT. ANN. § 565.12 (2)(b), § 565.14 (West Supp. 1983).

¹³ CONN. GEN. STAT. ANN. § 12-451 (West 1983); IND. CODE ANN. § 7.1-2-7-3 (Burns 1978); R.I. GEN. LAWS § 3-10-15, 16, 17 (1976).

beer and wine¹⁴ and two states impose such taxes on beer.¹⁵

As this brief is written, legislation is pending in one state that would impose a tax on the retail selling price of liquor produced in the state at a rate of 12% while liquor produced elsewhere would be taxed at a rate of 18%.¹⁶

These discriminatory state taxes raise the spectre of increasing tax discrimination against out-of-state products unless the Court strikes down the tax exemptions that are the subject of this appeal.

SUMMARY OF ARGUMENT

DISCUS relies on the brief of appellants for the proposition that the Hawaii liquor tax violates the Import-Export and Equal Protection Clauses. This brief focuses on the burden the tax imposes on interstate commerce.

The tax exemptions at issue on this appeal are the type of discrimination favoring local enterprises that has been condemned by the Court as a violation of the basic purpose of the Commerce Clause.¹⁷ The Twenty-first Amendment does not exempt this type of discrimination from the prohibitions of the Commerce Clause.

¹⁴ OHIO REV. CODE ANN. § 4301.54, 55 (Page 1982); OR. REV. STAT. § 473.040 (1981).

¹⁵ DEL. CODE ANN. tit. 4, § 728(a) (1975); PA. STAT. ANN. tit. 47, § 105(b) (Purdon 1969).

¹⁶ Pa. S. 407, Introduced February 24, Sess. of 1983.

¹⁷ The Commerce Clause, art. I, § 8, cl. 3, provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

ARGUMENT**I. HAWAII'S TAX EXEMPTIONS FOR HAWAIIAN OKOLEHAO AND FRUIT WINE BURDEN IN-TERSTATE COMMERCE**

In its decision below, the Supreme Court of Hawaii found that:

The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.¹⁸

Discrimination favoring okolehao and fruit wine manufactured in Hawaii is the declared purpose of the exemptions. Therefore, this is not a case where the burden on interstate commerce must be weighed against some claimed non-discriminatory purpose. This is that "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977), quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

HAWAII REV. STAT. § 244-4 (Supp. 1982) imposes a tax on all non-exempt beverage alcohol sold in Hawaii equal to 20% of the wholesale price. The parties have stipulated that being exempt from the liquor tax gives Hawaiian okolehao and fruit wine a substantial price advantage

¹⁸ *In re Bacchus Imports, Ltd.*, A-12-13, 65 Hawaii ___, 656 P.2d 724, 730 (1982) (footnote omitted). (The first citation is to the indicated pages of the Appendix to Jurisdictional Statement.)

over out-of-state products subject to the tax. See Joint Appendix 10, 16-17, 23. Therefore, the discriminatory effect of the exemptions is undisputed.

These exemptions are prohibited under the holding of *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 337 (1977), that "in the process of competition no State may discriminatorily tax the products manufactured . . . in any other State." That is so clear that the intriguing question is how the court below could have reached any other result.

The Hawaii court acknowledged that the test of whether the liquor tax violates the commerce clause is whether the exemptions discriminate against interstate commerce.¹⁹ However, in discussing the Commerce Clause the court ignored its own finding, quoted above at page 6, that the purpose of the exemptions is discrimination favoring locally manufactured products.

The court offered two reasons for its holding that the liquor tax does not discriminate against interstate commerce. The first was that the tax affects all wholesalers equally, regardless of where they are incorporated.²⁰ But that is irrelevant because the objection is that the tax discriminates against out-of-state products, not out-of-state wholesalers.

The second reason, and the real basis for the Hawaii court's conclusion that the tax does not violate the Commerce Clause, was that the taxpayers "failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce."²¹

¹⁹ A-22-24, 65 Hawaii at ___, 656 P.2d at 733.

²⁰ A-24-25, 65 Hawaii at ___, 656 P.2d at 733-34.

²¹ A-30, 65 Hawaii at ___, 656 P.2d at 735 (footnote omitted).

Here the court was actually saying that the taxpayers had failed to show how much discrimination there is. But discrimination is established by the stipulated fact that the exemptions give Hawaiian okolehao and fruit wine a substantial price advantage over out-of-state products. See pages 6-7, above. The fact of discrimination having been stipulated, there is no need to show its extent. *Maryland v. Louisiana*, 451 U.S. 725, 759-60 (1981).

* The record demonstrates that both the purpose and the effect of the Hawaii liquor tax is discrimination against out-of-state products in favor of local products, which is forbidden.

The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the [Commerce] Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). The apprehension expressed in that opinion of a "multiplication of preferential trade areas" was justified, as is shown by the discriminatory state beverage alcohol taxes discussed at pages 2-4 above.

II. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT STATE TAX DISCRIMINATION FAVORING LOCAL ENTERPRISES

The State of Hawaii does not claim that the exemptions of the Hawaii liquor tax are justified under the Twenty-

first Amendment.² There is no reference to the Twenty-first Amendment in the opinion of the Supreme Court of Hawaii below, nor is the Twenty-first Amendment cited in the State's motion to dismiss or affirm in this Court. The determination not to rely on the Twenty-first Amendment is well-considered.

Section 2 of the Twenty-first Amendment provides that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Nothing in that language suggests that states are given the power to favor local enterprises by discriminatory taxation.³

No decision of this Court has upheld a state's effort to promote local beverage alcohol by imposing a discriminatory tax on products brought into the state. No Supreme Court authority even arguably supports an interpretation of the Twenty-first Amendment that would permit this type of discrimination, with the possible exception of dictum in *State Board v. Young's Market Co.*, 299 U.S. 59 (1936). In that case California wholesalers challenged a state license fee of \$500 for importing beer. The taxpayers argued that the fee violated the Commerce and Equal Protection Clauses. The Court held that the Twenty-first Amendment permits a state to impose a license fee for importing beer.

² The State wrote in its answering brief in the Supreme Court of Hawaii below that "the State in the Tax Appeal Court and herein, has never attempted to justify its liquor tax under the Twenty-First Amendment, and the State asserts it needs no such justification." (R. 286.)

³ Focusing on the language of the Amendment is supported by "sound cannons" of constitutional interpretation. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980).

Young's Market did not involve discrimination. California brewers were required to pay a license fee of \$750 per year while beer importers were subject to a license fee of \$500 per year. The Court held that this different classification "rests on conditions requiring difference in treatment." (*Id.* at 64.) However, despite the fact that discrimination was not an issue, the opinion asked a series of "can it be doubted that" questions about state authority to engage in various types of discrimination against out-of-state beer, including imposition of a "heavy importation fee".²⁴ None of the types of discrimination mentioned in those hypothetical questions was involved in *Young's Market* and none of those types of discrimination has been upheld by the Court in any other case. Assuming that the opinion intended to imply affirmative answers to its rhetorical questions, those answers do not express the holding of the Court in *Young's Market* or any other case.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), the Court wrote that a conclusion that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause

would be patently bizarre and is demonstrably incorrect. . . .

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution.

²⁴ The series of questions asked whether it can be doubted that a state may establish a state monopoly of the brewing and sale of beer while laying a "heavy impost" on imported beer or confining all imports to a single consignee. After implying that a state may prohibit beer imports without establishing a state brewing monopoly, and then stating that a state may permit the brewing and sale of beer while prohibiting "hard liquors," the opinion asked whether a state may not permit domestic breweries while subjecting imported beer to "a heavy importation fee?" (*Id.* at 63.)

Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

The interest of the State of Hawaii in favoring local enterprises cannot prevail against the federal interest in "a competitive economy," *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980), and in "free trade among the several States," *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977).

The Twenty-first Amendment does not permit a state to ignore the Import-Export Clause by imposing a discriminatory tax on imported beverage alcohol.²⁸ It would be anomalous to hold that the Amendment permits a state to impose a discriminatory tax on beverage alcohol from other states that it may not impose on beverage alcohol from other countries.

²⁸ See *Department of Revenue v. James Beam Co.*, 377 U.S. 341 (1964); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 288 n.7 (1976).

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted,

RICHARD STAIR HARRELL

Counsel of Record

Suite 560

1700 Pennsylvania Ave., N.W.

Washington, D.C. 20006

(202) 347-5551

RUSSELL W. SHANNON

LAWRENCE B. GOTLIEB

1300 Pennsylvania Building

425 13th Street, N.W.

Washington, D.C. 20004

(202) 628-3544

Attorneys for Amicus Curiae

Distilled Spirits Council of the United States, Inc.